Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2009	)	MD Docket No. 09-65
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2008	)	MD Docket No. 08-65

JOINT COMMENTS

Bestel USA Inc., Hibernia Atlantic US LLC, and Level 3 Communications, LLC ("Joint Commenters"), file these comments on the Notice of Proposed Rulemaking in the captioned proceeding ("Notice"). Joint Commenters object to the proposal for carriers providing international terrestrial fiber-based non-common carrier services to pay international bearer circuit ("IBC") regulatory fees on non-common carrier circuits.[1] Each of the Joint Commenters have ownership interests in terrestrial cross-border fiber facilities between the U.S. and Canada and/or the U.S. and Mexico that may be subject either directly or indirectly to the proposed new IBC regulatory fees if adopted.

I. Background

Less than three months ago, the Commission adopted a new methodology for calculating regulatory fees from international submarine cable operators.[2] In that order, the Commission abandoned collecting regulatory fees from submarine cable operators based upon the number of 64 kilobits per second ("kbps") active circuits or "IBCs" in favor of collecting regulatory fees on a per submarine cable basis. Rates now vary according to the capacity of the cable, with a

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[1] *See* Notice at para. 14

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08-65, Second Report and Order, FCC 09-21, released March 24, 2009 (*"Submarine IBC Order"*).

capacity of 20 gigabits per second ("Gbps") or greater being the largest unit of capacity and a capacity below 2.5 Gbps being the smallest unit of capacity.

These changes reflected the economic and technological reality that submarine cable service is no longer offered in units as small 64 kbps, and that by charging fees based upon 64 kbps circuit equivalents, the Commission was charging excessive regulatory fees that in some instances exceeded the revenue recovered from the customer for the circuit. On the other hand, the regulatory fees for most other services amount to a fraction of a percent of the cost of providing service.

The *Submarine IBC Order* did not change the methodology for calculating IBC regulatory fees for satellite and terrestrial IBCs. The Notice of Proposed Rulemaking in that proceeding was limited to submarine cable IBCs, and no satellite or terrestrial international service provider commented. Noting that satellite and terrestrial IBCs are not licensed in the same manner as submarine cable IBCs, the Commission encouraged satellite and terrestrial IBC providers "to propose any changes to the regulatory fee methodology that would better serve their interests and the public interest."[3]

Notwithstanding that open invitation and not waiting to hear from them, the Commission proposes for the first time that carriers providing international service over terrestrial circuits pay IBC fees on non-common carrier circuits. As explained below, the Joint Commenters object on the grounds that (1) non-common carrier terrestrial fiber links are not regulated by the Commission, and the Commission does not have the authority to and never has imposed regulatory fees on non-regulated services; (2) any change in rate structure must be a result of additions, deletions or changes in the nature of the services as a consequence of rulemaking changes or changes in law; and (3) after reforming the regulatory fee structure for submarine

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[3] *Submarine IBC Order* at fn 48.

cables, there is no rational basis for imposing the old broken system of IBC regulatory fees based upon 64 kbps circuit equivalents on terrestrial fiber facilities since many of those circuits carry the same capacity as the submarine cable systems and face the same pricing pressure which will again result in regulatory fees for unregulated services exceeding the revenue the entity paying the fee receives from its customer. If the Commission and industry learned anything from the Submarine Cable situation, the pricing structure of the market will not support such excessive fees.

II. The Commission Lacks Statutory Authority to Impose Regulatory Fees on Unregulated Services

Section 9 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 159, directs the Commission to "assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities." 47 U.S.C. § 159(a)(1). Section 9(b)(1) of the Act provides the initial formula for determining the regulatory fees and is based upon the Commission's regulatory activities associated with facilities and services regulated by the Commission. In other words, any reasonable reading of Sections 9(a)(1) and 9(b)(1) leads to the conclusion that regulatory fees may not be assessed on facilities and services not regulated by the Commission. It is clear that the Commission does not regulate providers of non-common carrier cross-border terrestrial fiber facilities. Private carriers providing cross-border services do not need a license from the Commission, they do not file any reports with the Commission, nor does the Commission provide any services on their behalf. The Commission does not expend any resources on their behalf. Likewise, the Commission does not regulate non-common carrier

terrestrial fiber facilities. The Commission does not authorize them or collect data on them.[4] In most cases the Commission is not aware of their existence. It is hard to see any regulatory burden the Commission incurs as a result of the existence of these facilities, or the companies that own and use them. Therefore, the Commission does not have statutory authority to assess regulatory fees on such facilities or services. For the Commission to claim it has the authority to assess regulatory fees on non-regulated facilities and services leads to the absurd result that the Commission has authority to assess regulatory fees on all non-regulated facilities and services, no matter how tenuous their connection to Commission oversight.

Similarly, in the case of non-common carrier microwave paths receiving spectrum licenses from the Commission pursuant to Title III of the Act, the Commission recovers licensing activity regulatory fees on those facilities as part of the licensing process.[5] However, as is the case for non-common carrier cross-border terrestrial fiber facilities, the Commission does not assert Title II authority over the non-common carrier microwave paths, and hence does not have the authority to collect IBC fees on such facilities.

III. There Have Been No Changes in Law or Changes in the Nature of Services as a Consequence of Rulemaking Changes to Justify the Imposition of New Regulatory Fees

Section 9(b)(3) of the Act authorizes the Commission to make "permitted amendments" to the regulatory fee schedule as follows:

> [T]he Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.

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[4] This is in contrast to non-common carrier submarine cable facilities and providers who do receive licenses from the Commission, resulting arguably in some regulatory burden on the Commission that is compensated through regulatory fees.

[5] *See* Notice at Appendix H.

47 U.S.C. § 159(b)(3). The D.C. Circuit has held that the Commission must premise a permitted amendment upon changes in its services resulting from a Commission rulemaking or change in law because Section 9(b)(3) authorizes an amendment to the fee regime only "in response to [a] 'rulemaking proceeding[ ] or change[ ] in law.'"[6]

Since the non-common carrier international fiber facilities have always been unregulated and continue to be unregulated, there has been no rulemaking change or change in law to justify new regulatory fees. As a result, the Commission cannot single out owners of these facilities for IBC regulatory fees. Similarly, since non-common carrier international microwave paths have not been subject to Title II regulation and continue not to be subject to Title II regulation, the Commission cannot single out owners of these facilities for IBC regulatory fees in addition to the Title III regulatory fees already imposed as part of the licensing process.

IV. There is No Rational Basis for Imposing the Old Broken System of IBC Regulatory Fees Based Upon 64 kbps Circuit Equivalents on Non-Common Carrier Terrestrial Facilities

In the *Submarine IBC Order,* the Commission abandoned collecting regulatory fees from submarine cable operators based upon the number of 64 kilobits per second ("kbps") active circuits or IBCs in favor of collecting regulatory fees on a per cable basis. The Commission found that the change in collection of regulatory fees was in the public interest because it would increase compliance with the regulatory fee requirements. The Commission stated:

> Under the existing framework, the Commission relies on carrier self-reporting of regulatory fee obligations, based on section 43.82 reports of active circuits. Non-common carriers do not file these reports, but are required to pay regulatory fees. Thus, the Commission does not have an independent check on whether non-common carriers are paying their share of regulatory fees. Parties have stated to the Commission that there are non-common carriers who should pay, but do not. . . . Today's action addresses this concern because the Commission has a record of

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[6] *COMSAT Corp. v. FCC,* 114 F.3d 223, 225 (D.C. Cir. 1997) (quoting 47 U.S.C. § 159(b)(3).

> the cable landing licenses issued to licensees (including those licensees who have avoided paying their share of regulatory fees) and will now assess the fee for each license.[7]

The Commission was also concerned that the IBC regulatory fees discouraged new investment. The Commission stated:

> The new regulatory fee methodology will effectively eliminate concerns that the regulatory fees discouraged submarine cable operators from increasing capacity on their systems. On the contrary, the regulatory fee would become smaller on a per circuit basis as a cable's capacity is increased. We also anticipate a lower administrative burden on the industry and the Commission.[8]

Therefore, even if the Commission can find statutory authority to impose regulatory fees on non-common carrier international terrestrial facilities, the proposed methodology in this Notice is faulty for the same reasons that the Commission abandoned IBC regulatory fees for non-common carrier international submarine cables. First, owners of non-common carrier terrestrial fiber facilities do not necessarily need to be licensed so the Commission has no record of them. Second, the Commission has no record of how many cross-border non-common carrier terrestrial fiber circuits are active, so it cannot determine the proper allocation of the regulatory fees among such facility owners. Third, by imposing such a regulatory fee, the Commission is inviting the same type of gamesmanship and other problems presented previously in trying to allocate and capture regulatory fees from private submarine cable owners. And fourth, imposing large regulatory fees on such circuits will discourage new investment.

In addition to the reporting and compliance issue and the investment incentive issue, there is a cost issue. The Commission's legacy IBC regulatory fee methodology was designed for the voice-centric telecommunications environment of an earlier time. The methodology unfairly penalizes high-capacity fiber optic facilities deploying IP and fiber optic technologies by

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7 *Submarine IBC Order* at para. 8 (footnotes omitted).

8 *Id.* at para. 17.

assessing regulatory fees based on the number of active 64 kbps voice channel equivalent circuits. Technological advances and new applications have resulted in a shift away from a voice-centric smaller circuit channelized business model towards an application-neutral unchannelized larger capacity broadband model. As a result, imposing IBC regulatory fees on non-common carrier international terrestrial fiber facilities would lead to excessive regulatory fees and significant disruption in the marketplace. For example, as noted in the previous submarine cable proceeding, carriers often sell capacity now in amounts as high as 10 Gbps wavelengths. At the proposed $0.75 per 64 kbps circuit fee for FY 2009, the annual regulatory fee for a 10 Gbps wavelength between the U.S. and Canada or Mexico would be $90,720. Yet, the regulatory fee for a similar amount of capacity on a submarine cable connecting the two countries would be significantly less on a high capacity cable where the owners only pay a flat license fee for the entire cable. This is especially egregious considering there are some Commission regulatory activities associated with licensing and overseeing submarine cable systems, but no Commission regulatory activities associated with cross-border non-common carrier terrestrial fiber facilities.

In other words, IBC regulatory fees are based on a defunct architecture and technical limitations, and place a huge burden on modern high-capacity fiber systems that move data more efficiently and less expensively than earlier copper systems and satellites. If IBC fees are imposed on non-common carrier international terrestrial fiber facilities, regulatory fees may actually represent the single largest cost an operator would incur in providing its service. Thus, IBC regulatory fees would raise the cost of service to the fiber operators, their carrier and service provider customers, and end-users.

IBC regulatory fees would therefore be inappropriate for the application-neutral 21st century fiber transmission industry, and would place an undue burden on current and future high-capacity fiber systems. The 64 kbps circuit, however, is not an accurate indicator of a terrestrial fiber operator revenues. It is an artifact of the original channelized telephone systems installed in the early 1960s by American Telegraph and Telephone ("AT&T").[9] Specifically, each 64 kbps circuit made up one voice channel in the Bell Laboratories ("Bell Labs") T-carrier architecture, which would aggregate twenty-four (24) 64 kbps circuits into a channelized 1.544 Mbps duplex circuit ("T-1") for more efficient transmission between AT&T facilities.[10] Under this architecture, which would become the worldwide standard, each international 64 kbps circuit generated revenue in readily measured per-minute increments (particularly in voice applications). Therefore, a regulatory contribution mechanism that imposed a fee based on 64 kbps circuits could arguably be defended as nondiscriminatory and rational.

In contrast, in the current broadband environment, data passes unchannelized in packetized form over fiber facilities transporting hundreds of gigabits or even terabits of data simultaneously. The underlying content in these data streams is a mix of video, voice, Internet and miscellaneous data applications, and the parties that purchase the capacity typically acquire unchannelized bandwidth for flat rates at the STM-1 to multi-gigabit levels.[11]

The effect of dividing these large multi-gigabit data services into artificial 64 kbps increments for the purpose of assessing regulatory fees places an undue and disproportionate burden on non-common carrier international terrestrial fiber operators. Whereas a traditional

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[9] *See In the Matter of Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC 22340, 22348 (2004) (footnote 34 discussing 64 kbps and T-1 telephone system architecture).

[10] *See In the Matter of American Telegraph and Telephone Co., Charges for Interstate Telephone Service*, 64 FCC 2d 131, ¶ 63 (1976) (discussing AT&T's implementation of the T-carrier system beginning in 1962).

[11] An STM-1 (synchronous transport mode) circuit has a bit rate of 155 Mbps.

telephone carrier from the 1960s, 70s or 80s generated significant revenue for each 64 kbps circuit actively maintained on an international route, the massive improvements in efficiency and new applications (not billed in minute increments) result in a fiber facility generating very modest revenue per 64 kbps of a high bandwidth service. In fact, because fiber facilities are not designed to readily break out channelized 64 kbps derivative circuits, discounts for circuits smaller than an STM-1 are typically not available and purchasing a smaller circuit results in higher prices for consumers. The current generation fiber systems are so efficient that the price for capacity typically doubles for every four-fold increase in capacity after an STM-1. Therefore, purchasing a 10 Gbps service is approximately eight times the cost of an STM-1 even though the capacity on a 10 Gbps service is a 64 fold increase over the former service. As pointed out in the record leading up to the *Submarine IBC Order,* the end result of continuing to use this outdated methodology for assessing regulatory fees is that the IBC regulatory fees for a high-bandwidth service can sometimes reach almost 50 percent of a cable provider's cost.[12]

In dramatic contrast, the 2008 regulatory fees imposed on regulated interstate carriers total just $0.00314 per dollar of revenue, or less than one third of one percent of the price of the service.[13] Similarly, the 2008 CMRS Mobile/Cellular Service regulatory fee totaled only $0.17 per handset,[14] equaling less than one tenth of one percent of the price of wireless services,[15] and the 2008 fee for cable television operators totaled only $0.80 per subscriber,[16] or approximately

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[12] *See* VSNL Petition for Rulemaking at 3, RM No. 11312 (2006).

[13] *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08-65, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-182, released August 8, 2008 at Attachment C (*"2008 Regulatory Fee Order"*).

[14] *Id.*

[15] Conservatively assuming the a typical CMRS carrier generates annual revenue of $500 per subscriber, and each subscriber purchases a family plan with at least one additional handset (.40/500 = $.0008).

[16] *2008 Regulatory Fee Order* at Attachment C.

one tenth of one percent of the price of basic cable television service.[17] Compared to the regulatory fees imposed by the Commission in different sectors of the telecommunications industry, the IBC regulatory fees proposed to be imposed on non-common carrier international terrestrial fiber facilities would be hugely disproportionate and at odds with the Commission's long-standing goal of maintaining regulatory fees that have a *de minimis* effect on the price of a telecommunications service.[18]

V. Conclusion

For all the reasons stated herein, the Commission should refrain from imposing IBC regulatory fees on non-common carrier international terrestrial fiber facilities.

Respectfully submitted,

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[17] Based on annualized revenue derived from Comcast's reported $60.08 per television subscriber monthly revenue in Q1 of 2007 (.79/720 =$.001) (http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=991145&highlight).

[18] *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Notice of Proposed Rulemaking, FCC 07-55 (rel. April 18, 2007) (noting that regulatory fees only seek to collect "the necessary amount [Congress requires]... in the most efficient manner possible without undue public burden").